Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Petitioners*, v. FEDERAL POWER COMMISSION, *Respondent.*	No. 73-1380
ARIZONA POWER COMPANY, ET. AL., *Petitioners*, v. CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Respondent.*	No. 73-1666

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BUFFALO RAPIDS IRRIGATION PROJECT; CUSTER ROD & GUN CLUB; TONGUE-YELLOWSTONE BEET GROWERS; and TROUT, UNLIMITED, as *AMICUS CURIAE*

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By consent of Petitioners, Respondents and Intervening Petitioners-Respondents endorsed hereon, TROUT, UNLIMITED, et. al., files this brief as *amicus curiae.*

Interest of the Amicus Curiae

The *amicus curiae*, Buffalo Rapids Irrigation Project, Custer Rod and Gun Club, Tongue-Yellowstone Beet Growers, and Trout, Unlimited, have an interest in this case in that they have pending before the Federal Power Commission a Complaint and Petition to Show Cause[1] (filed in July, 1973)[2] which poses the same questions as those presented for decision in the instant cases, namely, whether the massive coal-fired electrical generating plants presently proposed to be constructed at Colstrip, Montana, by Montana Power Company and four Pacific-Northwest utilities[3], are subject to Federal Power Commission licensing jurisdiction under both Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), and the "project works" provision of the same act, 16 U.S.C. §797(e), because these plants will divert for *totally consumptive* use massive amounts of water from the Yellowstone River, a navigable river.

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[1] Section 18 C.F.R. §§1.6(a), (d), (1972).

[2] F.P.C., Docket No. E-8335.

[3] The other utilities are: Puget Sound Power & Light Co., Portland General Electric Co.; Washington Water Power Co.; and, Pacific Power and Light Co.

ARGUMENT

A. THE NORTHERN GREAT PLAINS

This brief does not attempt to treat the complex legal issues in these cases in an exhaustive manner. That has been done competently by the parties. The purpose of this brief is to place before this Court a different factual perspective — stemming from coal-fired electrical power development on the Northern Great Plains — so that this Court will be able to reach the very important legal issues presented in these cases with a more comprehensive understanding of the factual ramifications.

Montana and Wyoming contain under present calculations forty-six per cent (46%) of the nation's strippable reserves of bituminous coal and lignite. Strippable coal is found in this area (called the "Fort Union Formation") in seams of five (5) to two hundred fifty (250) feet in thickness with ten (10) to two hundred (200) feet of overburden[4]. Western coal, particularly that of the Fort Union Formation, because of its low sulfur content, is in high demand to satisfy this nation's seemingly insatiable energy needs.[5]

In 1970 and 1971, the United States Bureau of Reclamation, in conjunction with a number of utilities prepared the "North Central Power Study" which covered the states of Idaho, Montana, Wyoming, Colorado, North

[4] See: Melcher, Albert G., et. al., *Wanted-A Better Approach to Energy Planning*, ROMCOE, Denver, Colo. See also, "North Central Power Study," Report of Phase I, Vol. II, Bureau of Reclamation.

[5] See: *Second Annual Report*, Montana Environmental Quality Council, October, 1973.

Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Missouri. One summary which demonstrates the magnitude of the potential coal development in that area states as follows:

> "Proven strippable coal resources in the region are capable of sustaining well over 200,000 mw in thermal power plants of 1,000 mw or more, with 35-year economic lives. This is only a small part of the coal resource potential in the NCPS area. Forty-two potential sites have been identified. Ten of these, each for a 10,000 mw plant, are located in one area of about 30 by 70 miles centered on Gillette, Wyoming . . .
> (Footnote 4: . . . A 10,000 mw plant will be about 14 times as large as the renowned 'Four Corners' plant at Farmington, New Mexico, was when it first created the concern about air quality from the Southwest power plants. The Four Corners plant is being expanded to about 2,100 mw, still about one-fifth the size of some contemplated for the NCPS area . . .)"[6]

The development of electrical power from coal in the Northern Great Plains area is largely dependent on the supply of water. The 1973 report of the Montana Coal Task Force states:

> "Water controls all activity in this semiarid region, and the industrial future of the Fort Union coal fields is no exception because coal-based development requires enormous quantities of water for cooling and conversion. Because

[6] Id., Melcher, p. 10.

> most of the coal fields are far removed from existing surface water sources, the nature and extent of development would depend on the quantity of water made available at the mine site. A large volume of easily accessible water would allow extensive generating and conversion complexes. If this supply is not provided through several new storage facilities and an intricate system of government pipelines, development would be more restricted and probably concentrated on mining and export of coal."[7]

The major potential source of water for Fort Union coal development is the Yellowstone River system. The Yellowstone River begins high in the mountains of Yellowstone National Park and winds its way in a northeasterly direction through eastern Montana, and flows into the Missouri River near the Montana-North Dakota border. Although several tributaries of the Yellowstone have dams, the main stem of the Yellowstone is essentially unencumbered by man-made developments. At all points in the area of the coal development in question, the Yellowstone River is navigable.[8] The effect that coal development will have on the Yellowstone River has been stated as follows:

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[7] *Coal Development in Eastern Montana, A Situation Report of the Montana Coal Task Force*, January, 1973, p. 9.

[8] *Crow Tribe v. USA*, Civil No. 214, U. S. Dist. Ct. D. Mont., Judge Jameson, October 1, 1963; (this decision found the Big Horn river navigable to its confluence with the Little Big Horn and therefore subject to Federal jurisdiction. The Big Horn is a tributary of the Yellowstone. *A fortiori*, the Yellowstone is navigable at least to its confluence with the Big Horn, a point upstream from the Colstrip diversions.

> "One of the most significant coal-development issues is the prospect of massive consumption of water from the Yellowstone River and tributaries. The U. S. Bureau of Reclamation projects a possible annual water requirement of 2.6 million acre feet. This volume represents 29.7 percent of the river's average annual discharge (8.8 million acre feet per year), and in a dry year, such as those experienced in the early sixties, the river's annual discharge might be only half that figure. The same projected level of consumption would leave 1.8 million acre feet of water in the river in such a year, or 20.5 percent of the average flow. Once such industrial water consumption commences, it may be expected to continue regardless of the flow conditions, in the Yellowstone River System. The market place will continue to demand power."[9]

Thus, the problem of coal development and conversion ino electrical energy and the accompanying demand for massive amounts of water has become a focal one. Tie recently-published study sponsored by the Ford Foundation and the National Academy of Sciences, *Rehabilit-*

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[9] *Supra.*, Note No. 7, p. 39. See also: Anderson, Bob, "Water and Eastern Montana Coal Development," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. "What effect will massive diversions have on thee flow regions? If all of the options and applications for water are realized, about 2.7 mafy (3,730 cfs) will be diverted; presumably most or all of this water would be consumed. A glance at Figures 1 & 2 clearly shows that the Yellowstoie often does not even have that much water . . .

tion Potential of Western Coal Lands, is quite blunt about the problem:

> "The shortage of water is a major factor in planning for future development of coal reserves in the American West. Although we conclude that enough water is available for mining and rehabilitation at most sites, *not enough water exists for large scale conversion of coal to other energy forms* (e.g. gasification or steam electric power). The potential environmental and social impacts of the use of this water for large scale energy conversion projects would exceed by far the anticipated impact of mining alone. We recommend that alternate locations be considered for energy conversion facilities, and that adequate evaluations be made of the options (including rehabilitation) for the various local uses of the available water."[10] (emphasis added)

Earlier this year, the rate of water diversions in Montana became so alarming that Governor Judge proposed a 3-year moratorium on water diversions from the Yellowstone River (S.B. 728; the bill was passed). In introducing the moratorium proposal, the Governor stated:

> "With a near annual flow of about 9 million acre feet of water at our border, options, applications and requests have been made for approximately

[10] ***Rehabilitation Potential of Western Coal Lands*, A report of the Energy Policy Project of the Ford Foundation, National Academy of Sciences, Ballinger Publishing Co., 1974, p. 6.**

> 3,300,000 acre feet from waters in the Yellowstone Basin. In 1972, the Bureau of Reclamation projected that 2.6 million acre feet would be needed annually for coal development by the year 2002. In less than two years, that figure has already been far exceeded, and all indications are that this amount will grow significantly within the immediate future."[11]

B. THE COLSTRIP PLANTS

The specific interest of the *amicus curiae* is focused on the Yellowstone River in Montana, and the massive electrical generating plants which are being constructed (or contemplated) at Colstrip, Montana. The Montana Power Company, together with the Puget Sound Power and Light Co., are currently constructing two plants at Colstrip, Montana, with a proposed total capacity of 350 mw each. These two companies, together with three other utilities have proposed two more plants at Colstrip, each with a capacity of 700 mw.

These four plants will be coal-fired steam-generating plants with wet cooling (i.e. water-consumptive) processes. They will demand substantial amounts of water with no return flow to the river, as occurs with agricultural usage. For the Colstrip Units alone, the water demand will necessitate the construction of a 60-inch pipeline from the Yellowstone River near Nichols to the generating complex at Colstrip, a distance of about 30 miles.[12] Water consumption for Units 3 and 4 will average about 16,000 acre feet

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[11] Senate Journal of the Forty-third Legislature of the State of Montana, Vol. 1, p. 172.

[12] See: Note 7, *Supra*, p. 13.

a year with a maximum of up to 26,000 acre feet. Settling ponds covering 60 surface acres will be necessary.[13] These withdrawals will affect navigability since pumping structures will be located in the Yellowstone River. The complaint filed by the parties *amicus curiae* with the Federal Power Commission (Docket No. E-8335) has not been acted upon by the FPC for over one year. The parties *amicus curiae* are irrigation farmers (primarily growing sugar beets) downstream from the Colstrip diversion who are dependent upon a regular and adequate flow of the Yellowstone River, particularly in the late summer and early fall, and recreational users who make substantial use of the Yellowstone River for fishing, hunting and aesthetic purposes. The Montana Power Company appropriation will make use of surplus water from a government dam—namely, the Yellowtail Dam on the Big Horn River, a major tributary to the Yellowstone.

The water appropriation made on the Yellowstone River by the Montana Power Company (dated December 16, 1970) claims an appropriation of 250 cubic feet per second (112,200 gallons per minute) on all days and at all seasons of the year.[14] This appropriation was made pur-

[13] Gill, Thomas J., "Montana Coal-Development in Process 1973," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. Non-water effects relating to the construction of proposed Units 3 and 4 include the consumption of about 6 million tons of coal per year and the construction of a 500 kilovolt transmission line between Colstrip and Hot Springs, Montana, a distance of about 400 miles.

[14] Montana Water Resources Board, 1970, Montana Power's Notice of Appropriation.

Note: This appropriation equals approximately 181,000 acre feet per year. Approximately 20,000 acre feet per year is consumed annually by a 1,000 mw electrical

suant to the traditional Montana Water Law based on the prior appropriation theory — *i.e.* anyone has the right to appropriate unappropriated water as long as such water is put to beneficial use, Section 89-801; 89-802, Revised Codes of Montana (1947).[15] The Montana Power appropriation indicates the ease with which a person or a corporation can take the public's water. A part of the Yellowstone River is being studied by the Bureau of Outdoor Recreation for designation under the Wild and Scenic Rivers Act, P.L. 90-542,[16] yet, a corporation with a stroke of the pen can irreversibly dewater the stream. This total lack of Federal control over a river of national importance,[17] which is navigable and therefore subject to Federal jurisdiction, is one of the unfortunate and anomalous consequences of the failure of the Federal Power Commission to assert jurisdiction. Given the magnitude of the potential generating capacity of the strippable coal reserves of the Northern Great Plains, the first four Colstrip plants represent only

generating plant operating at full load and using an evaporative tower for cooling (*Rehabilitation Potential of Western Coal Lands, Supra*, p. 101). By these calculations, the appropriation by Montana Power could suffice for nine 1,000 mw plants.

[15] These sections have been repealed and the general Montana Water Law has been modified. See Section 89-866, *et. seq.*; nevertheless the appropriation by Montana Power Co. may well be at least partially valid by operation of the grandfather clause, §89-872, Revised Codes of Montana (1947). In any case, prior appropriation and beneficial use remain the operative factors governing Montana Water Law.

[16] See, Draft, "The Wild, Scenic and Recreational Potentials of the Yellowstone River, from Gardiner to Pompey's Pillar in Montana," prepared by Bureau of Outdoor Recreation, Mid-continent Region, Denver, Colorado, May, 1974.

[17] Ibid.

the beginning of a massive draining of the water resources of the region. That this can occur without the regulatory supervision of the Federal Power Commission, or any other Federal agency, does violence to the goal of comprehensive water resource planning that stimulated passage of the original Federal Water Power Act of 1920.

C. COMPREHENSIVE REGULATION OF WATER RESOURCE DEVELOPMENT

While there is undeniably substantial legislative history which seems to focus on the *hydroelectric* basis for the development of the Federal Water Power Act of 1920, the central purpose of the act was to provide for a *comprehensive* scheme of water development vis-a-vis power production. The Supreme Court discussed the history and purpose of the Federal Water Power Act in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152. The Court described the general purposes of the Act as follows:

> "It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a *complete scheme of national regulation* which would promote the *comprehensive* development of the water resources of the Nation, in *so far as it was within the reach of the federal power to do so*, instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a *comprehensive* development of national resources and not merely

> to prevent obstructions to navigation is apparent from the provisions of the act . . ." (emphasis added) (at 172 note 17).

The legislative history of the Federal Water Power Act reveals that a variety of concerns motivated the passage of the Act.[18] Among the concerns were: protection of navigability, removal of a disincentive for private hydroelectric development so that increased private power development would take place (by eliminating the uncertainty as to what the government would do once private dams were built)[19]; conservation of water resources through comprehensive planning[20]; and protection of the public's interest in its water from laissez-faire exploitation by the corporations.

In 1919, Senator Jones of Washington, said in respect to the 1919 version of the Federal Water Power Act:

> "The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of internal waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage."[21]

There was much debate over whether the powers of the Commission under the 1917 Act (Rivers and Harbors Act

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[18] This *amicus* brief does not purport to treat this legislative history exhaustively since this has been done by the parties.

[19] See Kerwin, J., *Federal Water Power Legislation* (1926), at 202-207; see also 1919 Cong. Rec. 244, Senate Debates.

[20] 66th Congress, 1st Session; House Committee on Water Power, Report No. 61, p. 3, p. 6.

[21] 1919 Cong. Rec. 241.

of 1917, 40 Stat. 269) should be retained by the Commission under the 1920 Act. Although the 1917 Act was expressly repealed, those favoring an expansive view of the powers of the Commission were assured that the essence of the Newlands Bill (the 1917 Act) was retained. After quoting from the 1920 bill (Secs. 4a and 4b), Senator Jones said:

> " . . . the splendid ideas of this great man have been very largely incorporated in the measures to which I have referred, and, while the pending bill proposes to repeal the clause which provided for that commission, we are continuing in a legislative way the great ideas of Senator Newlands to a very great extent."[22]

Newlands had argued for a very comprehensive water resources management system and the 1917 Act was passed to implement that system although a commission had not yet been appointed by the President under that Act.[23]

While it is clear that much of the Congressional debate *focused* on hydroelectric power, it is by no means clear that the framers purposely omitted steam power from Federal regulation as the Circuit Court suggests at p. 1231 of its opinion. This Court should, if possible, read the statutes in a manner which would result in a rational system of regulation by the Federal Power Commission. The attempt by the Circuit Court to make a distinction

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[22] 1920 Cong. Rec. 7772.

[23] See 1920 Cong. Rec. 7725, Senator Hale: "The present water-power act provides a method for getting permission of the Federal authorities to erect dams *and other obstructions* on the navigable waters of the country." (emphasis added)

(at p. 1232) between the use of fossil fuel to "elevate water for storage purposes" and the use of fossil fuel to heat water "to drive a turbine" is neither meaningful nor compelled by the legislative history.

The legislative history indicates that Congress was attempting to promote energy production through a rational and comprehensive scheme of water development. This Court should honor that attempt rather than sanction disingenuous distinctions. Since the *Taum Sauk* case, *FPC v. Union Electric Co.*, 381 U.S. 90 (1965) did not squarely face this issue and since the implementation of the *obiter dictum* in that case would produce anomalous consequences, that dictum should not control here.

Intervenors argue that:

> "The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water power, had no reason to concern itself with the insignificant quantities of water used by thermal plants." (Intervenors' brief, pp. 46, 47)

The obvious point neglected by the Intervenors is the *totally consumptive* nature of the use of water by the steam plants. At the Colstrip plants, for instance, there are no plans for returning any of the water to the Yellowstone River. The National Academy of Sciences study indicates:

> "Approximately 20,000 acre feet of water per year . . . is consumed annually by a 1,000 megawatt electrical generating plant operating at full

> load and using an evaporative tower for cooling . . .
>
> These figures represent the order of magnitude of the consumptive use of water for energy conversion and it is important to note that even with the use of water-efficient dry cooling towers, coal conversion processes will consume several million gallons per day of water . . . Even these quantities of water are not normally available at coal mine sites in the western United States. In most coal rich areas the local supply of ground or surface water is insufficient to meet the consumptive use requirements in conventional energy conversion processes."[24]

The *consumptive* nature of the steam generators is the factor which renders them, in many ways, more damaging to this country's navigable waterways than any hydro-electric plant. These truly-national waterways, which are being dewatered at the *laissez-faire* whim of the corporations, cry out for some scheme of comprehensive Federal regulation.

In addition to the above, the legislative history of the Federal Water Power Act reveals a distinct populistic attitude on the part of many of the supporters of the bill.

In 1908 and 1909, President Theodore Roosevelt vetoed several specific dam authorizations passed by the Congress under the General Dam Act of 1906. Among the conditions which Roosevelt indicated in his veto message of April 3, 1908, as necessary for his acquiescence were:

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[24] *Supra*, Note 10, p. 101.

> "Third. There shall be a license fee or charge which, although small and nominal at the outset, could be adjusted in the public interest.
> Fourth. There should be provision for the termination of the grant at a definite time, leaving the future to determine its course . . ."[25]

The 1920 bill incorporated these provisions. Furthermore the House Committee on Water Power stated:

> "Section 7 provides that in issuing preliminary permits or licenses the commission may, in its discretion, give preference to applications by states and municipalities provided the plans of same are deemed by the commission *best adapted to conserve and utilize* in the public interest and navigation and *water resources* of the region, and may likewise give preference to the applicant the plans of which it finds best adapted to develop, conserve, and utilize the navigation and water resources of the region."[26] (emphasis added)

Obviously, if the Federal Power Commission is going to limit artificially its jurisdiction to hydroelectric development, this mandate will be impossible to fulfill. The close scrutiny by the Federal Power Commission of a hydroelectric proposal on the Yellowstone River may be meaningless or even counterproductive if a private utility can, without any Federal guidance or control whatever, pirate massive amounts of water from public streams for fossil-fueled electrical production. At least in the *Chemehuevi* situation,

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[25] See: 66th Congress, 1st Session House Committee on Water Power Report No. 61, pp. 2, 3.

[26] Id at 6.

the United States Department of Interior had undertaken some review of the plants in question (albeit, inadequate). At Colstrip, Montana, there has been *no* Federal environmental impact statement prepared on the plants, and little, if any, indirect Federal review.

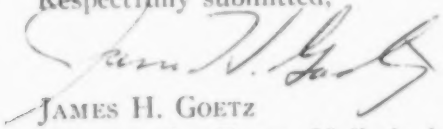
Finally, the giant coal-powered, steam generating plants contemplated for the Northern Great Plains, and now in their infancy at Colstrip, will result in hundreds of miles of transmission lines constructed across the rangeland, carrying locally produced electrical energy to distant, high-consumption regions of the nation. The prospect presents the irony of having enormous acreage of rangeland permanently destroyed or disfigured and the most precious resource of this semi-arid region drained from its rivers, while the beneficiaries of this destruction reside in population centers over a thousand miles away.

Although this Court has stated emphatically that, "there is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress," *Union Electric, Supra*, at 94, there arises the strong possibility that no Federal regulatory power will be exercised over the construction of steam generators and attendant transmission facilities in the Northern Great Plains. Unless, in the instant case, the Federal Power Commission jurisdiction is found to embrace coal-fired plants as well as hydroelectric generators, precedent will then lie for the uncontrolled exhaustion of the region's water resources, despite the historic mandate for a comprehensive development policy based on conservation of the limited navigation and water resources of the nation. To base that precedent on the facile distinction between hydroelectric and water-consumptive steam generators will, ironically, gut the fundamental purpose of the 1920 Act.

Conclusion

For the foregoing reasons, and for the reasons set forth by the Chemehuevi Tribe, et al., Trout, Unlimited, et. al., as *amicus curiae* respectfully submit that this Court should reverse the Circuit Court's ruling that fossil-fueled electrical generating plants are not "project works" under the Federal Power Act, and should affirm the Circuit Court's ruling that fossil-fueled electrical generating plants which use surplus water from a government dam are subject to Federal Power Commission licensing jurisdiction under the Federal Power Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail on the following persons on this ..... day of October, 1974:

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APPENDIX

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TO: Joseph Brecher, Esq.
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BUFFALO RAPIDS IRRIGATION PROJECT, c/o Ed Norlin, Project Manager, Terry, Montana, CUSTER ROD & GUN CLUB, c/o Bryan Schoof, President, Miles City, Montana, TONGUE-YELLOWSTONE BEET GROWERS, c/o Willie Day, C B Route, Glendive, Montana, and TROUT, UNLIMITED, c/o Lawrence Reno, Reno & Judd, 646 Metropolitan Building, Denver, Colorado, state that they are Complainants in Docket No. E 8335 before the Federal Power Commission, that they have asserted in their complaint that the Federal Power Commission has licensing jurisdiction under Part 1 of the Federal Power Act, 16 U.S.C. §§ 791a-823 to license as "project works," steam electric power plants that obtain cooling waters from navigable rivers of the United States (namely, the Yellowstone River in Montana); and that the Federal Power Commission has jurisdiction to license use by thermal-electric generating plants of "surplus

water" from any government dam; that they have a vital interest, therefore, in supporting the position of the Chemehuevi Tribe in the above-entitled action, and, therefore, request the consent of the parties to the filing by Buffalo Rapids Irrigation District et. al. of a brief *amicus curiae* in support of the position of the Chemehuevi Tribe of Indians.

Dated July 10, 1974.

s/JAMES H. GOETZ

JAMES H. GOETZ
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Bozeman, Montana 59715
Attorney for Buffalo Rapids Irrigation District, et. al.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

s/JOSEPH J. BRECHER

JOSEPH BRECHER

s/NORTHCUTT ELY
NORTHCUTT ELY

s/ROBERT H. BORK

ROBERT H. BORK